

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VENICE PI, LLC,

Plaintiff,

v.

RANDY PATTERSON;
BRIAN HAWES;
DOE 9; and
YEN KHUN,

Defendants.

Civil Action No. 17-cv-1163TSZ

PLAINTIFF'S RESPONSE RE
VOLUNTARY DISMISSAL OF
DEFENDANT PATTERSON

In its April 25, 2019 Minute Order (Dkt. 63), the Court refused to recognize the voluntary dismissal of Plaintiff's claims against Defendant Randy Patterson:

With regard to defendant Randy Patterson, who filed an objection, docket no. 60, to plaintiff's response, docket no. 59, to the Court's Minute Order entered October 19, 2018, docket no. 58, the Court DECLINES to permit plaintiff to voluntarily dismiss its claim without prejudice in the absence of any proof of service of its notice of voluntary dismissal on Mr. Patterson.


With regard to Mr. Patterson, plaintiff's notice is treated as a motion to dismiss, and is NOTED for May 24, 2019. Mr. Patterson may file, on or before May 20, 2019, a response to plaintiff's motion, indicating whether he objects to dismissal of plaintiff's claim without prejudice, which would allow plaintiff to refile its claim against him in another case. Any reply shall be filed by the new noting date.

Plaintiff respectfully submits that this result is not consistent with applicable court rules or Ninth Circuit precedent. Pursuant to Fed. R. Civ. Proc. 41(a)(1), in the absence of filing either an answer

PLAINTIFF'S RESPONSE RE VOLUNTARY
DISMISSAL - 1

Civil Action No. 17-cv-1163TSZ

INIP-6-0096P26 RESPVDismiss

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1 or a motion for summary judgment by the defendant, there is no discretion; Plaintiff's notice of
 2 voluntary dismissal without prejudice must be recognized and honored. As explained by the Ninth
 3 Circuit:

4 Hamilton's filing of the Notice of Dismissal had the effect of dismissing his action.
 5 The language of Rule 41(a)(1)(i) mandates this result and we are not free to amend
 or alter the rule as the appellees have urged us to do.

6 *Hamilton v. Shearson-Lehman Am. Express, Inc.*, 813 F.2d 1532, 1535 (9th Cir. 1987);
 7 *Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1077-78 (9th Cir. 1999) ("this
 8 'absolute right' for a plaintiff voluntarily to dismiss an action when the defendant has not yet
 9 served an answer or a summary judgment motion leaves no role for the court to play.") (citing
 10 cases, internal citations omitted); *American Soccer Co. v. Score First Enters.*, 187 F.3d 1108, 1999
 11 (9th Cir. 1999) (district court reversed for vacating voluntary dismissal under Rule 41(a)(1) and
 12 dismissing with prejudice and awarding fees; district court lacked jurisdiction to rule on the merits
 13 of the case because absolute right to notice a voluntary dismissal "may not be extinguished or
 14 circumscribed by adversary or court."); *Samho Co., Ltd. v. Sorks-Iturup*, 254 F. App'x 569, 570-71
 15 (9th Cir. 2007) (district court loses jurisdiction over the dismissed claims and may not address the
 16 merits of such claims or issue further orders pertaining to them).

17 Defendant did not file either an answer or a motion for summary judgment in this case.
 18 Defendant's "objection," filed in response to Plaintiff's Response to Show Cause Order (Dkt. 59),
 19 was neither an answer or a motion for summary judgment, and there is no exception for other
 20 filings. *See, e.g., Hamilton*, 813 F.2d at 1535 (stipulation not treated as the equivalent of an answer
 21 for purposes of Rule 41(a)(1); "If a defendant desires to prevent a plaintiff from voluntary
 22 dismissal under Rule 41(a)(1)(i), it may do so by merely filing an answer or motion for summary
 23 judgment."); *Swedberg v. Marotzke*, 339 F.3d 1139, 1146 (9th Cir. 2003) (Rule 12(b)(6) motion).

24 Accordingly, Plaintiff's April 22, 2019 Notice of Voluntary Dismissal (Dkt. 62) terminated
 25 the case against Defendant and there is no basis for treating the notice as a motion to dismiss.
 26

1 Plaintiff is aware of no legal requirement to serve a notice of voluntary dismissal, including on a
2 defendant that has never answered in a case. As explained above, the district court has no discretion
3 to dismiss with prejudice, to decline to recognize a notice of voluntary dismissal when no answer
4 or motion for summary judgment has been filed, or to condition such notice on proof of service on
5 a party that has never appeared and answered.

6 Notwithstanding that the voluntary dismissal was effective regardless of any response from
7 Defendant, it is further noteworthy that Defendant declined to respond to the Court's Minute Order
8 indicating any objection to Plaintiff's dismissal without prejudice.

9 For the reasons set forth, Plaintiff respectfully submits that the case against Defendant was
10 voluntarily dismissed without prejudice effective April 22, 2019, and no further orders or filings
11 are permitted or should be recognized thereafter.

12 s/ David A. Lowe, WSBA No. 24,453

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served to all counsel or parties of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

s/ David A. Lowe

